

~~FCC MAIL SECTION~~ Federal Communications Commission

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Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

In the Matter of)	
)	
Amendment of Commission's Rules)	WT Docket No. 97-82
Regarding Installment Payment Financing for)	
Personal Communications Services (PCS))	
Licenses)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1999

Released: November 8, 1999

By the Commission:

1. We have before us an Application for Review ("Application") filed by Omnipoint Corporation ("Omnipoint") on March 15, 1999. Omnipoint requests review of an order ("Order")¹ by the Wireless Telecommunications Bureau's Auctions and Industry Analysis Division ("Division") denying its request for waiver of Section 24.712 of the Commission's rules.² For the reasons set forth below, we reject Omnipoint's arguments and affirm the Division's Order.

2. Omnipoint, a C and F block broadband Personal Communications Service (PCS) licensee and high bidder in Auction No. 22,³ seeks a waiver of Section 24.712 so that its eligibility for size-

¹ Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Mark J. Tauber, Counsel for Omnipoint Corporation, DA 99-332 (February 12, 1999).

² Section 24.712 states that a winning C block bidder that is a "small business" may use a bidding credit of 15 percent to lower the cost of its bid and that a winning C block bidder that is a "very small business" may use a bidding credit of 25 percent to lower the cost of its bid. 47 C.F.R. § 24.712. Under Section 24.720(b) of the Commission's rules, a small business has average annual gross revenues not exceeding \$40 million for the preceding three years; whereas, a very small business has average annual gross revenues not exceeding \$15 million for the preceding three years. 47 C.F.R. § 24.720(b); see 47 C.F.R. § 1.2110(e)(2)(ii), (iii).

³ Auction No. 22, the latest auction of C and F block PCS spectrum, began on March 23, 1999 and closed on April 15, 1999. See "C, D, E, and F Block Broadband PCS License Auction Closes: Winning Bidders of 302 Licenses Announced," *Public Notice*, DA 99-757 (released April 20, 1999).

based bidding credits in Auction No. 22 may be based upon its average gross revenues for the three years preceding its applications for the initial C and F block auctions. Grant of a waiver would render it eligible for the same 25% bidding credit in Auction No. 22 that it qualified for in the initial C and F block PCS auctions, in which it was a high bidder.

3. In its Order, the Division found that Omnipoint failed to demonstrate that the public interest would be served by grant of a waiver of Section 24.712.⁴ The Division's Order adhered to the Commission's decision in the *C Block Fourth Report and Order*⁵ to determine bidding credit eligibility in future C block auctions at the short-form application filing deadline, and not to "grandfather" bidding credit status from prior C block auctions.

4. Omnipoint requests review of the Division's Order on the grounds that its conclusions conflict with established Commission policy.⁶ Omnipoint argues first that the Division failed adequately to consider the public interest by misconstruing Commission policy, as set forth in the *Fifth Memorandum Opinion and Order* in the competitive bidding docket.⁷ While Omnipoint admits that its current business size makes it ineligible for a larger bidding credit, it submits that a proper reading of the *Fifth Memorandum Opinion and Order* required the Commission to base Omnipoint's eligibility for bidding credits on its business size at the time of an earlier C block auction. Second, Omnipoint argues that the Division failed adequately to consider Omnipoint's special circumstances, which make grant of its waiver request in the public interest. Upon review, we find that grant of Omnipoint's waiver request would not be consistent with Commission policy. Moreover, we agree with the Division that Omnipoint's request does not meet the standard for grant of a waiver.

⁴ In order to obtain a waiver of Section 24.712, Omnipoint must show either (i) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. See Order at 2; 47 C.F.R. § 24.819.

⁵ See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Fourth Report and Order*, 13 FCC Rcd. 15743, 15768-69, ¶ 47 (1998) ("*C Block Fourth Report and Order*").

⁶ Section 1.115 of the Commission's rules requires an application for review to specify, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) the action involves a question of law or policy which has not previously been resolved by the Commission; (iii) the action involves application of a precedent or policy which should be overturned or revised; (iv) an erroneous finding as to an important or material question of fact; (v) or prejudicial procedural error. See 47 C.F.R. § 1.115(b)(2) (1997).

⁷ Application at 8-17. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, FCC 94-285, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 438-39, 441, ¶¶ 62, 66-77 (1994) ("*Fifth Memorandum Opinion and Order*").

5. Omnipoint claims that the *Fifth Memorandum Opinion and Order*,⁸ the Commission established special bidding credit unjust enrichment rules for license transfers to entities that hold other entrepreneurs' block licenses and thus, at the time of the initial C or F block auction, satisfied the entrepreneurs' block criteria, regardless of business size. On the basis of this claim, Omnipoint extrapolates that Commission policy allows it, as an entrepreneur in an earlier auction, to acquire entrepreneurs' block licenses from other licensees without incurring any unjust enrichment obligations, though the original licensee may have qualified for a larger bidding credit than Omnipoint, in effect grandfathering Omnipoint's earlier (and larger) bidding credit. Therefore, Omnipoint claims that it could obtain the benefit of a very small business bidding credit in a secondary market transaction, even if it would not be able to obtain the benefit directly in Auction No. 22 under Section 24.712. Omnipoint believes that the Division's application to Omnipoint of Section 24.712, governing business size standards and bidding credits, contradicts this policy.

6. We disagree with Omnipoint's contentions. As discussed in the Division's Order,⁹ Omnipoint's reliance on the *Fifth Memorandum Opinion and Order* is misguided. Omnipoint's argument is based entirely on its interpretation of one sentence in the *Fifth Memorandum Opinion and Order* discussing the application of unjust enrichment rules in the event a licensee transfers entrepreneurs' block licenses:

"[W]e clarify that between years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. **Unjust enrichment penalties (as described above) apply if these requirements are not met**, or if they qualified for different provisions at the time of licensing."¹⁰

Omnipoint relies on the bolded language while ignoring the remainder of the sentence that clearly states that the provision does not apply in situations where the licensees qualified for different levels of bidding credits.¹¹ However, this interpretation is contrary to the Commission's intent and, indeed, is contradicted in the next paragraph of the same order:

[W]e reiterate that if a designated entity transfers or assigns its license before year five to a company that qualifies for no bidding credit, then such a sale will entail full payment of the bidding credit as a condition of transfer. If, however, the same transaction occurs (during the same time frame), but the buyer is eligible for a lesser bidding credit, then the difference between the bidding credit obtained by the seller

⁸ *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 468, ¶ 126.

⁹ See Order at 3.

¹⁰ *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 468-69, ¶ 126 (emphasis added).

¹¹ See *Ex Parte* Letter of Mark J. Tauber and Mark J. O'Connor, Counsel for Omnipoint Corporation, to Ari Fitzgerald, Esq., FCC, dated January 25, 1999 (filed in WT Docket No. 97-82).

and bidding credit for which the buyer would qualify, must be paid to the U.S. Treasury for the transaction to be approved by the FCC.¹²

Moreover, the *C Block Fourth Report and Order*, which thoroughly discusses the grandfathering exception to the entrepreneurs' block eligibility requirement, makes no reference to a grandfathering exception to bidding credit unjust enrichment obligations.¹³

7. Second, Omnipoint contends that special circumstances necessitate that we grant its waiver request. It states that it is the only C block licensee that has outgrown its prior bidding credit eligibility. It argues that the Commission is responsible for the delays in auctioning available C block spectrum, absent which Omnipoint would still qualify as a very small business. Finally, Omnipoint protests that it made its June 1998 election decisions based on the Commission's promise of a meaningful opportunity to participate in the next C block auction.

8. We find these arguments unpersuasive. While the Commission attempted in its restructuring orders to address the many concerns of participants in the prior two C block auctions, it did not attempt to place -- and expressly indicated that it would not place -- prior participants in the same position they would have occupied had the initial C block auctions not occurred.¹⁴ Omnipoint had no reasonable basis on which to expect that it would automatically qualify in upcoming C block auctions for the same level of bidding credits for which it previously had been eligible.

9. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Section 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the Application for Review submitted by Omnipoint IS DENIED as provided herein.

FEDERAL COMMUNICATIONS COMMISSION


Magalie Roman Salas
Secretary

¹² See *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 469, ¶ 127. See also *id.* at 466, ¶ 119; *Fifth Report and Order*, 9 FCC Rcd at 5591, ¶ 134 (Commission adopts the bidding credit unjust enrichment rule with no mention of grandfathering a licensee's eligibility for bidding credits).

¹³ See *C Block Fourth Report and Order*, 13 FCC Rcd. at 15,768-69, ¶ 4. See also 47 C.F.R. § 24.709(b)(9)(i).

¹⁴ See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8359, ¶ 36 (1988) ("If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the reauction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place").